Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
	)	
Totality of the Circumstances Test	)	

REPLY COMMENTS OF THE ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES

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Table of Contents

Summary

A multitude of comments filed in response to the *Notice* confirm that the Commission should leave its "totality of the circumstances" test as it currently exists: a flexible, adaptable, context-specific tool for determining whether, with respect to the particular facts of an individual retransmission consent negotiation, the parties have satisfied their statutory obligation to negotiate "in good faith." The changes proposed in the *Notice*, which disproportionately focus on negotiating behaviors by broadcasters rather than MVPDs, would not advance the public interest or protect consumers. Instead, as the self-serving comments of MVPDs make clear, they would only give MVPDs an unfair and unwarranted advantage in private retransmission consent negotiations.

MVPD commenters unanimously decry the current state of the retransmission consent marketplace, describing it (and the good faith negotiations that characterize it) as broken, lopsided, and flawed. They describe marketplace changes that supposedly disadvantage MVPDs—a rise in competition among MVPDs and increased broadcaster leverage. They point to supposedly dramatic increases in retrans fees and the growing number of service interruptions, yet say nothing of the increase in costs of non-broadcast content (much of which is owned by MVPDs) and, of course, say nothing about the rise in subscriber fees and equipment and service costs that are totally unrelated to retransmission consent.

But rhetoric should not obscure facts. The fact is, contrary to MVPDs' "the sky is falling" arguments, the retransmission consent marketplace is not "broken" or in crisis; it is healthy, vibrant, and functioning. Since the good faith regime was implemented in 2000, hundreds of local stations and hundreds of MVPDs in hundreds of markets across the country have successfully negotiated thousands of retransmission consent agreements. To be sure, negotiations can

sometimes be contentious. MVPDs and local stations each seek to achieve the best possible deal, and conflict is not uncommon when both parties have negotiating leverage and neither party is in a position to dictate its preferred terms and conditions. But such conflict indicates a competitive market, not one in crisis, and more than 99 percent of negotiations result in agreement with no threat of disruption of service, let alone actual service interruptions. Indeed, retransmission consent negotiations are considerably more efficient and productive, and less acrimonious and contentions, than many negotiations that routinely take place among federal government officials in Congress.

Understandably, MVPDs would prefer to pay less for the privilege of retransmitting and reselling local broadcast station signals—and, by the same token, local broadcasters would prefer to pay less for the marquee programming contained in their signals and less for the cost of talent, labor, and equipment necessary to broadcast that programming. But Congress has determined, and rightly so, that all of those costs are best regulated by market forces—not by the Commission. Rules that artificially drive down retrans fees would clearly benefit large, powerful, consolidated MVPDs, but, as the *Notice* observes, there is no assurance that the "benefits" of Commission regulation would be passed along to consumers in the form of lower MVPD subscription rates.

Nor is Commission action necessary to rescue consumers from the consequences of a service interruption in the rare event of a retransmission consent negotiating impasse. Contrary to standard MVPD rhetoric, a broadcast station's signal is never "blacked out," even when it becomes temporarily unavailable via one MVPD in a particular market. Viewers are not "denied access" to local programming or forced to "miss their favorite shows," because the signals of local stations are always available from other local MVPDs and always remain available for *free*, over the air, to any viewer with an over-the-air antenna.

But even if MVPDs' self-serving motives for seeking Commission intervention were not apparent, their arguments for Commission oversight of the substance of retransmission consent negotiations are fundamentally flawed, built as they are on a series of demonstrably false assumptions about "competition" in the MVPD marketplace, broadcasters' "undue leverage," and the need to protect consumers by tipping the retransmission consent negotiation balance in MVPDs' favor. Stripped of those false assumptions, it is clear that the proposals contained in the *Notice* exceed the Commission's authority under the Communications Act and STELAR, would unfairly and unnecessarily place a thumb on the retrans scale in MVPDs' favor, and ultimately would harm, not help, the viewing public.

Commission micromanagement of the substance of retrans negotiations as proposed in the *Notice* would not, as MVPDs suggest, advance consumer welfare or protect consumers against losing "access" to broadcast programming (which always remains available for *free* over the air), but would only give MVPDs a decided marketplace advantage. And those proposals would be impossible to administer as a practical matter (as exemplified by calls for a regulatory prohibition on expiration of agreements on the eve of so-called "marquee events"), would conflict with exclusive rights conferred on broadcasters by copyright law (as exemplified by calls for Commission oversight of online distribution of broadcast programming), would undermine legitimate, bargained-for contractual rights of networks and affiliated stations (as exemplified by proposed prohibitions on interference with out-of-market stations' willingness to grant retrans consent), or would inject the Commission into the very heart of the economic bargain to be struck by parties negotiating retransmission consent in the private marketplace (as exemplified by various proposals for Commission evaluation of methods for calculation of and supposed discrimination in retrans rates). In every case, MVPDs simply have not made a case that Commission intrusion is necessary or appropriate when the rates, terms, and conditions of retransmission consent are successfully determined by marketplace conditions.

One issue raised in the Commission's *Notice*—network appropriation of affiliate stations' retransmission consent negotiation rights—does not bear on "good faith negotiation." Nevertheless, the Affiliates Associations reiterate that networks are prohibited from commandeering, either directly or indirectly, the statutory right and responsibility of affiliate stations under Section 325 of the Communications Act to negotiate the terms and conditions on which a station's signal will be retransmitted.

Finally, MVPDs have not established that the Commission has authority, under STELAR or otherwise, to micromanage the substantive details of privately-negotiated, MVPD resale/retransmission consent agreements. From the very outset of the good faith regime, Congress has made clear, and the Commission has understood, that its role in overseeing retransmission consent negotiations was to be limited to ensuring that the parties come to the bargaining table with a genuine intent to seek to reach agreement. Because the rules proposed in the *Notice* would vastly exceed that limited role—and to no end other than placing a thumb on the scale in MVPDs' favor at the negotiating table—the Commission should make no change to its existing good faith rules.

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The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the "Affiliates Associations")[1] submit these reply comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") in the Commission's review of the "totality of the circumstances" test for evaluating the extent to which broadcast stations and multichannel video programming distributors ("MVPDs") negotiate retransmission consent in good faith.[2]

[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

[2] The Commission's review was undertaken pursuant to a congressional directive. *See Implementation of Section 103 of the STELA Reauthorization Act of 2014*, *Totality of the Circumstances Test*, Notice of Proposed Rulemaking, FCC 15-109, ¶ 1 (Sept. 2, 2015) ("*Notice*").

The overwhelming weight of comments filed in response to the *Notice* confirms that the Commission should not change its "totality of the circumstances" test. The modest congressional directive to "review" the current test does not require the Commission to change the test, and the transparently self-serving comments of MVPDs seeking a retransmission consent negotiating advantage contain no justification for a change. The robust retransmission consent marketplace belies MVPDs' claims that there is a market- or consumer-based need for change. The Commission should, therefore, leave the test as it currently exists: a flexible, context-specific tool for determining whether, with respect to the particular facts of an individual retransmission consent negotiation, the parties have satisfied their statutory obligation to negotiate "in good faith."

I. Introduction

Broadcasters' opening comments explained why the proposals in the *Notice*, which disproportionately focus on negotiating behaviors and proposals *by broadcasters* rather than MVPDs, would not advance the public interest or protect consumers but, instead, would, unfairly and without justification, give MVPDs an unjust regulatory advantage in private retransmission consent negotiations. MVPDs' opening comments only confirm that the proposals in the *Notice* would do just that. Understandably, MVPDs would prefer to pay less for the privilege of retransmitting and reselling local broadcast station signals—and, by the same token, local broadcasters would prefer to pay less for the marquee programming contained in their signals and less for the cost of talent, labor, and equipment necessary to broadcast that programming. But Congress has determined, and rightly so, that all of those costs are best regulated by market forces—not by the Commission. And while they trumpet their supposed concern for their subscribers' welfare, MVPDs are careful to make no promise that any Commission-mandated reduction in retransmission consent fees would be passed along to consumers in the form of lowered rates.[3] In any event, the faux pro-consumer rhetoric of MVPDs misses a critical point: "[C]onsumers ultimately benefit from a process that fairly values content and leads broadcast stations and networks to continue to invest in" critical local news, weather, sports, emergency information, public affairs, and entertainment programming.[4]

But even if MVPDs' self-serving motives for seeking Commission intervention were not apparent, their arguments for Commission oversight of the substance of retransmission consent negotiations are fundamentally flawed, built as they are on a series of demonstrably false assumptions about "competition" in the MVPD marketplace, broadcasters' "undue leverage," and the need to protect consumers by tipping the retransmission consent negotiation balance in MVPDs' favor. Stripped of those false assumptions, it is clear that the proposals contained in the *Notice* exceed the Commission's authority under the Communications Act and STELAR, would unfairly and unnecessarily place a thumb on the retrans scale in MVPDs' favor, and ultimately would harm, not help, the viewing public.

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[3] *See, e.g.*, Comments of Graham Media Group (Dec. 1, 2015) ("Graham Media Comments") at 7 ("There is no evidence that MVPDs will lower subscriber rates if they are able to depress retransmission consent rates payable to broadcasters."); Comments of the National Association of Broadcasters (Dec. 1, 2015) ("NAB Comments") at 55 ("MVPDs cannot show—or even credibly claim—that their one-sided proposals will benefit viewers by lowering consumer bills or improving services."). All citations to comments herein are to those filed in response to the *Notice* in this proceeding, MB Docket No. 15-216, unless otherwise noted.

[4] Comments of the Writers Guild of America, West, Inc. (Dec. 1, 2015) ("WGA Comments") at 2.

II. Contrary to MVPD Arguments, the Retransmission Consent Marketplace Is Not in Crisis, Broadcasters Do Not Wield "Undue Leverage," and Consumers Won't Be Helped by MVPDs' Proposed Reforms

MVPD commenters repeatedly sound the theme that the retransmission consent marketplace is in crisis, broadcasters hold all the cards, and only Commission intervention will restore "balance" to allegedly-lopsided retrans negotiations and protect consumers against rising pay television costs. But the contention that broadcasters' unfair negotiating behavior has skewed the marketplace for the distribution of programming to the detriment of consumers is simply untrue. A multitude of opening comments confirms that the retransmission consent market *is* healthy, vibrant, and functioning to produce mutually beneficial retransmission consent agreements, just as Congress envisioned. Indeed, retransmission consent negotiations are considerably more efficient and productive, and less acrimonious and contentions, than many negotiations that routinely take place among federal government officials in Congress.

A. The Retransmission Consent Marketplace Is Healthy and Vibrant

MVPD commenters unanimously decry the current state of the retransmission consent marketplace, describing it (and the good faith negotiations that characterize it) as "broken,"[5]

[5] Comments of the American Cable Association (Dec. 1, 2015) ("ACA Comments") at 2; Comments of Verizon (Dec. 1, 2015) ("Verizon Comments") at 1-2; Comments of AT&T (Dec. 1, 2015) ("AT&T Comments") at 1 (retrans regime is "a broken relic of a bygone era").

"artificially lopsided,"[6] "seriously flawed,"[7] and "an utter failure."[8] They describe marketplace changes that supposedly disadvantage MVPDs—a rise in competition among MVPDs and competing services[9] and increased broadcaster leverage.[10] They point to supposedly dramatic increases in retrans fees over the course of the retransmission consent regime and the growing number of service interruptions[11]—yet say nothing of the increase in costs of non-broadcast content (much of which is owned by MVPDs) and, of course, say nothing about the rise in

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[6] Comments of CenturyLink (Dec. 1, 2015) ("CenturyLink Comments") at 2.

[7] Comments of the United States Telecom Association (Dec. 1, 2015) ("USTA Comments") at 3.

[8] Comments of Mediacom Communications Corp. (Dec. 1, 2015) ("Mediacom Comments") at 5.

[9] *See, e.g.*, AT&T Comments at 1 ("While local broadcasters continue to enjoy protected monopolies over their content, the MVPD market now involves competition between cable companies, satellite operators, fiber-based providers, and online video distributors ('OVDs')."); Comments of Cablevision Systems Corp. (Dec. 1, 2015) ("Cablevision Comments") at 4 ("Today, broadcasters have available numerous outlets of distribution, through several different platforms."); Comments of the American Television Alliance (Dec. 1, 2015) ("ATVA Comments") at 35-36 ("Today, broadcasters continue to enjoy their monopoly position, while cable faces a host of MVPD competitors, from DBS operators to telephone companies to overbuilders, as well as a growing challenge from video delivered via broadband.").

[10] *See* ACA Comments at 2, 11, 35-36 (declaring that broadcasters have "considerable market power"); AT&T Comments at 1, 5-6 (asserting, without citation to supporting evidence, that broadcasters today have "significant market power, which they routinely exploit"); *id*. at 18, 22 (claiming that broadcasters have "undue leverage"); Comments of Time Warner Cable Inc. (Dec. 1, 2015) ("TWC Comments") at 8 (claiming that Commission rules confer "undue leverage" on broadcasters); Cablevision Comments at 5.

[11] *See, e.g.*, TWC Comments at 7; ACA Comments at 6, 9; ATVA Comments at 14-15; Mediacom Comments at 22 (suggesting that broadcasters "use blackouts and blackout threats to force MVPDs to agree to terms that are not in the best interests of their customers and that they would not otherwise accept"); AT&T Comments at 8 (attributing so-called blackouts to "broadcasters' brinkmanship") (citation omitted).

subscriber fees and equipment and service costs that are totally unrelated to retransmission consent.

But rhetoric should not obscure facts. The fact is, as numerous commenters have pointed out, the overwhelming majority of retransmission consent negotiations that take place every year result in agreement, with no threat of disruption of service, let alone *actual* service interruptions.[12] Multiple broadcast station commenters have never, or only on very few occasions during decades of the retransmission consent regime, experienced a disruption of service arising from a negotiation impasse.[13] The few service disruptions that do take place—as a result of hard

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[12] *See, e.g.*, Comments of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (Dec. 1, 2015) ("Affiliates Associations Comments") at 15-16; NAB Comments at 7; Comments of Hearst Television Inc. (Dec. 1, 2015) ("Hearst Comments) at 8; Comments of CBS Corporation (Dec. 1, 2015) ("CBS Comments") at 8-9; Comments of The E.W. Scripps Company (Dec. 1, 2015) ("Scripps Comments") at 2; WGA Comments at 1-3; Comments of Univision Communications, Inc. (Dec. 1, 2015) ("Univision Comments") at 3, 5-6.

[13] *See, e.g.*, Scripps Comments at 2 ("All of Scripps' negotiations have been successfully concluded without any service disruptions or ill will."); Graham Media Comments at 2 ("Graham has successfully negotiated hundreds of retransmission consent agreements without ever coming to an impasse or 'going dark' on an MVPD."); Comments of Saga Broadcasting, LLC (Dec. 1, 2015) ("Saga Comments") at 2-3 ("In the past 20 years, for as long as Saga has owned these stations, there is not one instance where either of Saga's stations have been removed from carriage by any of its partner MVPDs due to a retransmission consent dispute."); Comments of Morgan Murphy Media (Dec. 1, 2015) ("Morgan Murphy Comments") at 8-9 ("[T]he only MVPD with which [Morgan Murphy] has ever failed to reach an agreement is DISH Network, but even during a retransmission consent dispute last summer, Morgan Murphy stations KXLY-TV (Spokane, WA) and KVEW-TV (Yakima, WA) agreed to allow temporary access to the stations on DISH Network to ensure that viewers would have access to emergency information regarding local wildfires."); Comments of Raycom Media, Inc. (Dec. 1, 2015) ("Raycom Comments") at 6 ("[O]ut of hundreds of retransmission consent negotiations Raycom has conducted in the two decades since the company's founding, the company has reached an impasse with an MVPD only three times."); Comments of Gray Television Group, Inc. (Dec. 1, 2015) ("Gray Comments") at 2 ("Over twenty plus years and negotiating several thousand retransmission consent agreements, Gray was unable to reach an agreement with an MVPD precisely two times. Yet, in both instances, after a brief dispute, the parties quickly came to terms, and service was restored for the MVPD's

bargaining, not exploitation of unfair leverage—are limited in duration[14] and, quite tellingly, involve only a small handful of the very largest MVPDs that wield the greatest negotiating leverage.[15] Of course, negotiating impasses and interruptions of MVPD service do not indicate a marketplace breakdown, and they are certainly not a violation of the good faith rules.[16] They are the hallmark of every truly competitive marketplace—and they are self-correcting. When the government threatens to intervene, parties, understandably acting in their self-interest, attempt to exploit the government's process to secure regulatory arbitrage. If the Commission would only leave the negotiating process alone, the predictable MVPD regulatory maneuvering would be replaced by the normal checks and balances that exist in highly competitive markets—which would prevent abuse by either party.

That more than 99 percent of negotiations are concluded successfully following negotiations conducted in good faith is underscored by the Commission's own acknowledgement that only a single party—an MVPD—has been found by the Commission to have violated the good

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customers."). *See also* WGA Comments at 3 (noting that "[p]rotracted negotiations are extraordinarily rare" and, to WGA's knowledge, "only one such protracted impasse is ongoing in the country at this time").

[14] WGA Comments at 3-4 (noting that only 11 percent of MVPD subscribers "experienced a broadcast service interruption due to negotiation impasse" in 2014 and, "of those subscribers, 95% had their broadcast service restored within a week" (citing SNL Kagan, *Retrans Roundup 2014* (Jan. 28, 2015), *available at* http://www.snl.com/InteractiveX/doc.aspx?ID=30852150)).

[15] *See* Affiliates Associations Comments at 12; Raycom Comments at 2.

[16] As the Commission has recognized from the outset, "failure to reach agreement does not violate Section 325(b)(3)(C)." *Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5462, ¶ 40 (2000) ("*Good Faith Order*").

faith obligation.[17] Again, *no broadcaster has ever been found by the Commission to have engaged in retransmission consent negotiations in bad faith*—an inconvenient truth for the strident rhetoric of the pay TV providers.

B. Broadcasters Do Not Wield "Undue Leverage" in Retransmission Consent Negotiations

Although they bemoan the advent of competition in the program distribution market, MVPDs are not, in fact, struggling to survive amidst hordes of competitors and powerless, as they claim, against the overwhelming leverage wielded by broadcast stations that supposedly exploit unfair market power as the providers of so-called "must-have" programming.[18] Numerous commenters dispel the fallacy that increasing competition in the distribution of video programming has diluted MVPDs' negotiating leverage—or increased that of broadcast stations. In fact, a defining characteristic of the television distribution marketplace in recent years has been massive consolidation and growth in the size and geographic footprint of MVPDs resulting from mergers and other business arrangements.[19] As commenters point out, it strains credulity to believe that

[17] *See* Affiliates Associations Comments at 15-16; WGA Comments at 4-5; *Notice*, ¶ 5 & nn.31-32 (citing *Letter to Jorge L. Bauermeister*, 22 FCC Rcd 4933, 4935 (2007)).

[18] *See, e.g.*, ACA Comments at 22-33, 56.

[19] *See* NAB Comments at 1-2, 16-19 (noting that, following recent MVPD mergers, "the top ten MVPDs will control a whopping 94 percent of the nationwide MVPD market (measured in terms of subscribers), with the top four MVPDs controlling 79 percent of the market and the top three alone controlling two-thirds of the video delivery universe"); CBS Comments at 5-6 (urging the Commission to "recognize one of the most significant changes in the retransmission consent landscape—namely, the dramatic growth in size of many MVPDs that has occurred since adoption of the retransmission consent negotiation structure" and noting that "these large-scale MVPDs, many with national or near-national reach, increasingly have significant leverage over local broadcast stations in their retransmission consent negotiations"); Morgan Murphy Comments at 5 (citing Commission reports establishing that "as of the end of 2013, five MVPDs served approximately 71% of all MVPD subscribers, even before considering the additional video

local stations—particularly smaller station groups—exercise "market power" or undue negotiating leverage over MVPD conglomerates like AT&T/DIRECTV, Time Warner Cable, and DISH Network.[20]

Equally fallacious is the notion that broadcasters wield disproportionate market power as monopolistic sources of "must-have" programming. Broadcast networks and stations have no monopoly on the creation of high-quality television programming. The facts are very much to the contrary: There has been an enormous explosion in the creation, production, and distribution of video content in recent years.[21] Broadcasters face intense—and fast-growing—competition from numerous sources of programming (including the 800+ programming networks carried on pay TV systems today as well as over-the-top services such as Amazon, Netflix, and Hulu) for viewers and for advertising dollars, and they have every incentive to come to the bargaining table in a good

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subscribers in the recent AT&T/DirecTV transaction"); Comments of 21st Century Fox, Inc. and Fox Television Stations, LLC (Dec. 1, 2015) ("Fox Comments") at 4-5 ("[G]eographic clustering of MVPDs makes the pay-TV marketplace even less competitive"); Comments of Joint Broadcasters (Dec. 1, 2015) at 5-6, 8-11 (noting, among other things, that "in the majority of instances television station groups are dwarfed in size" by increasingly large, consolidated MVPDs with market capitalization in the billions); Comments of Nexstar Broadcasting, Inc. (Dec. 1, 2015) ("Nexstar Comments") at 8 (noting that "the top ten cable MVPDs account for 91.5% of all [MVPD] subscribers" (citing Sixteenth Report, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 15-41, MB Docket No. 14-16, ¶ 25 (released April 2, 2015))).

[20] *See, e.g.*, Morgan Murphy Comments at 6.

[21] *See* NAB Comments at 1 (noting that video programming has exploded, pay TV distributors carry more than 800 channels of programming, and the marketplace has become "remarkably competitive"); Comments of The Walt Disney Company (Dec. 1, 2015) ("Walt Disney Comments") at 3-7.

faith effort to have their content reach as many eyeballs as possible.[22] As the National Association of Broadcasters has explained, "broadcast TV stations 'must have' pay TV distribution at least as much as MVPDs 'must have' broadcasters."[23] Market forces in today's competitive video distribution market are self-policing.

MVPDs' "the sky is falling" declarations to the contrary are unfounded. As "evidence" for the proposition that broadcasters are (mis)using their supposedly unfair negotiating leverage to obtain retrans rates disproportionate to the true market value of their programming, MVPD commenters point to the fact that retransmission consent fees have increased from *zero* dollars since the inception of the retrans regime.[24] To be sure, in the early years of the retrans consent regime, MVPDs refused to pay cash compensation of any kind for the privilege of reselling broadcast signals, and, instead, "in kind" consideration, in the form of offers by MVPDs to provide

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[22] *See, e.g.*, NAB Comments at 8-15 (explaining that, in light of the enormous proliferation of video content, "the days of broadcast TV's dominance of prime time viewership have passed" and broadcasters today "have every incentive to be seen on each and every MVPD"); CBS Comments at 5 (noting that, "while MVPDs lament the competition from Netflix, Amazon, *et al.*, they conveniently ignore that such services compete with broadcasters as well"); Fox Comments at 6-7; Morgan Murphy Comments at 7-8 (noting "the strong incentives that Broadcasters and MVPDs have to avoid service disruptions to their viewers," because "the broadcaster, the MVPD and the viewer all suffer in the case of prolonged disruptions"); WGA Comments at 4 (noting that "incentives for broadcasters to reach agreement remain strong," because "[a]dvertising continues to account for a majority of local station and broadcast network revenue and the increased choice in original programming offered by basic cable, pay TV and online video distributors means that a blackout could cause a local station to lose viewers to these alternatives"); Comments of Media General, Inc. (Dec. 1, 2015) ("Media General Comments") at 10.

[23] NAB Comments at 13.

[24] *See, e.g.*, AT&T Comments at 1, 3-4 (when good faith negotiation requirement was imposed in 2000, "negotiations typically resulted in cable providers carrying the local broadcaster—and perhaps additional affiliated channels—for free").

additional channels for the distribution of additional programming, was the rule. Today, the marketplace is saturated with a seemingly endless supply of program choices, and the form of consideration sought by broadcasters has changed from "in kind" consideration only to cash or to a mix of "in kind" and cash consideration. That change, however, does not reflect an increase of any kind in the retrans negotiating leverage of broadcasters; rather, it indicates only that the marketplace has changed—and has become considerably more competitive.

Various commenters note that broadcast stations are, in fact, "significantly underpaid" compared to cable/satellite channels given the popularity of the programming they provide:

> Despite contributing far fewer channels to the task, broadcasters deliver far more viewers proportionally to cable and satellite systems than do cable channels. For example, 43 percent of the MVPD primetime audience is watching broadcast television. Eighty-five of the 100 top-rated shows nationally are on broadcast television. Despite this disparity, MVPDs paid basic cable channels nearly ten times the amount of fees that were paid to broadcasters.[25]

[25] Graham Media Comments at 3-4 (citing *The Higher Math of Retrans*, TVNewsCheck (Winter 2014), *available at* http://www.tvnewscheck.com/assets/files/ExO-Winter2014-LoRes-pg6.pdf); *see also* Affiliates Associations Comments at 3-4; Hearst Comments at 3 ("Broadcasters have repeatedly demonstrated that MVPDs have historically undervalued broadcast programming in comparison to valuation of non-broadcast programming."); WGA Comments at 6-7 (observing that retrans fees "account for a relatively small portion of a[n MVPD] subscriber's monthly bill" and "amount[] to less than the cost of regional sports networks, premium services or basic cable networks, despite the fact that broadcast television provides the most highly rated programming on television"); Saga Comments at 5 n.5 (noting that 47 of the top 50 "most-watched series during the 2014-15 season originated on the national broadcast networks" (citing http://www.tvinsider.com/article/1989/top-50-tv-shows-2014-2015-highest-rated-winners-and-losers/)); Media General Comments at 14 (noting that "[r]etransmission consent fees . . . remain at a discount to affiliate fees charged by many cable networks for similar and lower-rated programming"); Fox Comments at 5 ("The fees paid for retransmission consent are a small fraction of the overall cost base of MVPDs large and small, with broadcast retransmission fees accounting for only a small percentage of every dollar of distributors' video revenue." (citing Jeffrey A. Eisenach, NERA Economic Consulting, *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content* (July 2014) at ii ("Eisenach Report"))).

It is telling that MVPD commenters recite "percentage" increases in retransmission consent fees since 2000 rather than citing the prices actually paid for the right to retransmit broadcast signals[26]—particularly as those prices compare to the rates paid for non-broadcast programming.[27] The actual dollar figures make clear that the price of "broadcast television is a bargain."[28]

Equally unfounded is the notion that increasing numbers of service disruptions indicate unfair holdout behavior by broadcasters. As numerous commenters have pointed out, the vast majority of retransmission consent negotiations—even contentious negotiations—are concluded successfully, with no disruption of service.[29] MVPDs' suggestions that retrans impasses are

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[26] *See* Cablevision Comments at 5-6; AT&T Comments at 1, 2; TWC Comments at 7-8; ATVA Comments at 14-16; USTA Comments at 3-4; Comments of ITTA—the Voice of Mid-Size Communications Companies (Dec. 1, 2015) ("ITTA Comments") at 3, 14 (describing retransmission consent fees as "skyrocketing"); Comments of Public Knowledge and Open Technology Institute at New America (Dec. 1, 2015) ("Public Knowledge Comments") at 6-7; Comments of NTCA—The Rural Broadband Association (Dec. 1, 2015) ("NTCA Comments") at 6-7. *Cf.* Mediacom Comments at 8 (characterizing retrans rate increases as "[h]yper-inflationary").

[27] *See, e.g.*, Graham Media Comments at 4-6 (comparing "the Nielsen Household Ratings of its stations to five of the most popular cable channels" and "the reported estimates of the 2015 average per subscriber fees paid to them by MVPDs" based on SNL Kagan data and concluding that the "average estimated per-subscriber retransmission consent fee paid to broadcasters in 2015"—$1.05—is significantly less than the estimated average per-subscriber fees paid to certain cable channels, including ESPN ($6.64) and TNT ($1.65)—thus, "[b]roadcast television is underpaid"); WGA Comments at 7-8 (observing that, "even though the ratings of some ESPN programming are on par with the major broadcast networks, ESPN by itself costs $6.61 per subscriber per month while broadcast stations cost an average of $0.86 per subscriber per station per month" (citing Scott Robson, *What would ESPN cost a la carte?* SNL Kagan (Aug. 18, 2015), *available at* http://www.snl.com/interactivex/article.aspx?id=33568277&KPLT=6)); Gray Comments at 15-17 (observing that the "average 'Big Four' retransmission consent fee of $1.11 per subscriber per month" is lower than the monthly per-subscriber fees paid for lower-rated cable networks); Nexstar Comments at 11 (asserting that MVPDs ignore "that even today retransmission fees represent just 3% of MVPDs' total programming costs and 2% of their revenues") (citation omitted).

[28] Graham Media Comments at 4.

[29] *See* nn.12-13, *supra*.

widespread ignores the thousands upon thousands of successful retrans negotiations that have taken place under the Commission's good faith regime—and ignores the fact that the few true impasses involve the same small group of large MVPDs that routinely drive some negotiations to the point of impasse in hope of securing regulatory intervention.[30] Perpetual MVPD whining to regulators in no way suggests a marketplace failure.

To be sure, retransmission consent negotiations can sometimes be contentious. Both MVPDs and broadcast stations aggressively seek to achieve the best possible deal, for each, and conflict is not uncommon—when *both* parties have negotiating leverage, significant imbalances of power are not commonplace, and neither party is in a position to dictate its preferred terms and conditions. That, after all, is how competitive markets work. But even the most intense negotiations almost always lead to agreement, without a disruption of service or even a serious threat of disruption, and the need for Commission intervention is, indeed, rare—a fact confirmed

[30] *See, e.g.*, pp. 6-7 & n.15, *supra*; Graham Media Comments at 6-7 ("Instances of unsuccessful retransmission consent negotiations that lead to an impasse are rare, and the problems that have arisen in recent years stem from a small number of MVPDs that frequently steer negotiations toward impasse. . . . In 52 out of the[] 81 [retrans consent impasses since 2012], either DIRECTV or Dish Network was the MVPD involved in the negotiations. In other words, negotiations with just two MVPDs have led to approximately 64 percent of all retransmission consent impasses over the past four years."); Media General Comments at 10 ("Characterizing service interruptions as solely a broadcaster 'threat' not only ignores [a] basic premise of negotiation, it is belied by the evidence," which shows that "70% of the negotiation impasses charted by American Television Alliance occurred with three MVPDs: Dish Network, DIRECTV, and Time Warner Cable." (citing American Television Alliance, Blackout List 2010-2015, *available at* http://www.americantelevisionalliance.org/wp-content/uploads/2013/05/ATVA-Comprehensive-List-of-Broadcaster-Retrans-Blackouts-2010-2015.docx)); Nexstar Comments at 5-6; Affiliates Associations Comments at 12.

by the relative dearth of good faith negotiation complaints filed since the good faith rules were implemented fifteen years ago.[31]

C. MVPDs' Proposals Will Harm, Not Advance, Consumer Welfare

MVPD commenters are anything but the "consumer-rights" champions they claim to be. Although they profess to be advocating on behalf of the interests of their subscribers,[32] their proposals are embarrassingly self-serving: None of the MVPD-proposed "reforms" would lower consumer prices or increase consumer welfare; rather, they would simply increase the profit margins of MVPDs.[33]

Contrary to MVPDs' overblown claims, an increase in retransmission consent fees does not translate into "consumer harm" in the form of rising subscription prices, because those fees are not the only, or even the primary, factor "driving video subscription rates higher."[34] As noted above, MVPDs pay significantly higher fees to other content providers, including cable/satellite networks, for much lower-rated, less popular programming—a substantial contributor to MVPD

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[31] *See* Affiliates Associations Comments at 15-16; *Notice*, ¶ 5 & nn.31-32.

[32] *See*, *e.g.*, ACA Comments at 2-3; *id*. at 49 n.131 (proposing that "any behavior intentionally causing consumer harm should be considered a violation of the obligation to negotiate in good faith"); ATVA Comments at 38-39 (urging the Commission to "explicitly consider the public interest" and arguing that "[t]he Commission should thus find a violation of the totality of the circumstances test where a negotiating party unduly harms television viewers in retransmission consent negotiations" (emphasis omitted)).

[33] *See, e.g.*, Media General Comments at 13 (arguing that "the concept of 'consumer harm' should not be a proxy for MVPDs to complain about the fair market value of content, nor should it be used to force an agreement upon either party to a retransmission consent negotiation").

[34] ACA Comments at 2.

subscription charges, as are such MVPD-controlled costs as the fees charged to subscribers for "set-top boxes" and other equipment.[35] Moreover, the suggestion of MVPDs that "higher programming costs"—supposedly driven by broadcasters' negotiating leverage—inevitably "are passed through to consumers"[36] is misguided. Rules that artificially drive down retrans fees would clearly benefit large, powerful, consolidated MVPDs, but as the Commission itself noted,[37] there is no assurance—and MVPD commenters are careful to offer none—that the "benefits" of Commission regulation would be passed along to consumers in the form of lower subscription rates.[38]

Finally, but perhaps most importantly, contrary to standard MVPD rhetoric, a broadcast station's signal is never "blacked out," even when it becomes temporarily unavailable via one

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[35] *See* NAB Comments at 56 ("Perhaps MVPDs are able to report consistent revenue increases despite having to compensate broadcasters for reselling their signals, because retransmission consent fees 'account[] for less than three percent of cable operators' revenues and ha[ve] little or no impact on pay TV prices." (citing Eisenach Report at ii)); WGA Comments at 6-7 (pointing out that retrans fees "account for a minor share of a subscriber's monthly cable bill" and cost subscribers "a fifth of what MVPDs charge to rent set-top boxes").

[36] ACA Comments at 27; *see also id*. at 28; Mediacom Comments at 33-34 (complaining that "broadcasters' escalating demands for payment in exchange for retransmission consent are driving up the cost of MVPD service at a pace that far exceeds inflation").

[37] *See Notice*, ¶ 3 n.21 (acknowledging that "MVPDs are not required to pass through any savings derived from lower retransmission consent fees," so that "any reductions in those fees thus might not translate to lower consumer prices for video programming services").

[38] *See* NAB Comments at 55-56 (observing that the Commission's "own reports on cable industry consumer prices have shown that from 1995-2014, expanded basic cable prices increased at a compound average annual rate of 5.9 percent, compared to a 2.4 percent compound average rate of growth in the Consumer Price Index," so that "the Commission cannot expect MVPDs to pass on any programming cost savings to their customers" (citing *Report on Cable Industry Prices*, DA 14-1829, at ¶ 28 (Dec. 15, 2014))).

MVPD in a particular market when both parties are unable to reach agreement.[39] Viewers are not unable to access broadcast programming (and are not "'denied access to local . . . programming'"[40] or forced "to miss their favorite shows"[41]), because the signals of local stations are always available from other local MVPDs and always remain available for *free*, over the air, to any viewer with an over-the-air antenna.[42] Commission action is not necessary to rescue consumers from the consequences of a service interruption in the rare event of a retransmission consent negotiating impasse because a station's over-the-air signal is never "withheld." And, significantly, none of the MVPD commenters explains how their proposals for the Commission's heavy-handed intrusion into retransmission consent negotiations in a highly-competitive market would reduce or eliminate negotiating impasses.[43]

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[39] *See* ATVA Comments at 6-7 (claiming that "[s]o far this year, broadcasters have engaged in almost two hundred blackouts"); USTA Comments at 4. ATVA acknowledges that its tabulation "treats each market in which a station blacks out its signal as a separate 'blackout'" (ATVA Comments at 7 n.25), which significantly inflates the number of service disruptions. *See* Nexstar Comments at 6 ("Looking at the ATVA reported disputes between a single broadcasters and a single MVPD for 2015, the number of impasses is only 28 (not 200) or less than 0.2 percent of all agreements negotiated in the three year period covering 2013-2015").

[40] Mediacom Comments at 19 (quoting Statement of FCC Chairman Thomas E. Wheeler on Retransmission Consent Dispute Between Dish Networks and Sinclair Broadcasting (Aug. 26, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335057A1.pdf). *See also* ACA Comments at 56 (claiming that a prohibition on "online blocking" would "protect[] consumers from losing access to programming"); ATVA Comments at 32 (arguing that "the subscriber who has done nothing wrong should not lose network programming"); USTA Comments at 5 (suggesting that "consumers lose access to their local broadcast channel" during a service interruption).

[41] TWC Comments at 28.

[42] *See, e.g.*, Affiliates Associations Comments at 13; WGA Comments at 1-2.

[43] *See, e.g.*, Gray Comments at 2 ("A viewer of one of Gray's stations is far more likely to lose service as a result of a lightning strike or other technical difficulties within an MVPD's plant than a retransmission consent dispute."). *See also* NAB Comments at 52-55 (observing that, if the

The other side of the coin is equally compelling: Commission micromanagement of privately-negotiated retransmission consent agreements that MVPDs endorse—including regulation of the core economic terms of those agreements—would seriously compromise broadcasters' ability to continue to invest in the creation and dissemination of valuable, high-quality national and local programming. Viewers would ultimately suffer harm if the *price* paid for the right to retransmit local broadcast signals were artificially established by Commission rule, in derogation of competitive market forces. MVPD-sanctioned retransmission consent rates and terms would threaten local broadcasters' ongoing ability to invest in local news, weather, emergency, public affairs, and public information programming as well as high-quality network, syndicated, entertainment, and sports programming. As several commenters noted, the production and acquisition of that valuable local programming is supported in significant part by retransmission consent revenues.[44] Artificial reduction in those fees would seriously compromise local stations' ability to continue to provide that programming *free* over the air.

Commission "were to artificially limit stations' negotiating options, then those negotiations may more easily reach a deadlock").

[44] *See, e.g.*, Morgan Murphy Comments at 2-3 ("[T]rue local broadcast programming responds to local viewers' needs and interests, but such programming does not pay for itself. Without fair compensation for the cost of producing such programming, the quality and quantity of such programming inevitably diminishes. . . . [F]air compensation for retransmission consent remains a critical financial component for broadcasters."); Univision Comments at 8 ("Revenue derived by Spanish-language programmers from retransmission consent is used to fund programming and other initiatives that are designed to inform, empower and entertain the U.S. Hispanic community."); WGA Comments at 8-9 (noting that retrans fees "fund[] local news, weather, emergency and public affairs programming"); Media General Comments at 14-15.

Some MVPD commenters contend that local broadcasters are not, in fact, applying retransmission fees to support the creation and dissemination of local programming.[45] By way of example, Mediacom proclaims that "stations' retransmission consent demands have become untethered from the goal of preserving and expanding free local television service; instead of funding the creation and distribution of local content, local broadcasters use retransmission consent revenues to pay 'reverse compensation' to the national broadcast networks, to finance the acquisition of additional stations and non-broadcast ventures, or to fund stock repurchases and exorbitant executive salaries."[46] Mediacom cites no source in support of these outlandish argument—which is unsurprising, given that the facts are to the contrary.

As the National Association of Broadcasters has observed, "[i]n 2013, the monies that broadcasters earned in retransmission consent fees 'accounted for 34 percent of their spending on programming,'" enabling local broadcast stations to undertake "a number of pro-consumer initiatives, including increased 'local television news and public affairs programming,' investments in 'digital multicasting' (including foreign language programming streams) and new technologies, and the retention of 'rights to programming, especially sports programming, that

[45] *See, e.g.*, ATA Comments at 21-22; AT&T Comments at 7-8 (arguing that while retrans fees are increasing, "broadcasters have actually decreased investment in local programming"; citing Philip M. Napoli, *Retransmission Consent and Broadcaster Commitment to Localism*, 20 CommLaw Conspectus 345, 354-61 (Nov. 2012)).

[46] Mediacom Comments at 10; *see also id.* at 11 (alleging that broadcasters use retrans fees "for purposes unrelated to the production and acquisition of locally-oriented and originated programming or the expansion of the geographic reach of the local broadcaster's over-the-air service"); ATVA Comments at 21-22 (alleging that "[a]s retransmission consent rates increase, investments in local programming lags").

would not otherwise have been available on free over-the-air television.'"[47] Numerous other commenters cite the importance of retransmission consent revenues to the creation and dissemination of local programming.[48]

MVPDs' contrary comments overlook the point that the cost to local broadcasters of acquiring marquee network programming in today's highly-competitive video marketplace continues to rise—which, in turn, accounts for the increases in retransmission consent fees.[49] If local broadcasters do not continue to invest in the acquisition of highly-valued, marquee programming, that programming will simply migrate behind subscription pay walls, to the ultimate detriment of viewers—and, in particular, viewers who cannot afford a pay TV service and are wholly dependent on the *free*, local, over-the-air service provided by the nation's local television stations.[50] Such a result is hardly in the national interest—and is, in fact, directly contrary to the congressionally-mandated system of local, over-the-air television broadcast service.

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[47] NAB Comments at 56-57 (quoting Eisenach Report at 28, 29-33).

[48] *See* n.44, *supra*.

[49] *See, e.g.*, Gray Comments at 10 ("The fact is high-quality sports, entertainment, and news programming is expensive to produce, and programming costs—especially for live sports—are increasing." (citing Cecilia Kang, *Bidding War Between Networks, Sports Leagues Will Increase Price of Cable TV*, WASH. POST (Jan. 23, 2105), *available at* http://www.washingtonpost.com/business/economy/bidding-war-between-networks-sports-leagues-will-increase-price-of-cable-tv/2015/01/23/d0cb19f4-9db8-11e4-a7ee-526210d665b4_story.html)).

[50] *See* Gray Comments at 10 ("If (contrary to its statutory mandate) the Commission turns this proceeding into a referendum on retransmission consent fees or other substantive business points, the Commission must recognize that any change to the Good Faith Negotiating Rule that handcuffs local broadcasters would cause top quality programming to migrate from free, over-the-air broadcast television to unregulated, expensive pay cable networks.").

III. Both the Instruction in STELAR and the Commission's Jurisdiction Under Section 325 Are Carefully Limited, Foreclosing the Sweeping, Intrusive Role in Dictating the Substance of Retransmission Consent Agreements That MVPDs Urge

MVPD commenters uniformly disregard the demonstrably limited command of Section 103(c) to "*review*" the totality of the circumstances test.[51] The statute in unambiguous terms directs the Commission to do nothing more than that. It does not, as multiple commenters point out, require (or authorize) the Commission to alter or update the test in any respect, to expand the list of *per se* violations of the good faith negotiation requirement, or even to report back to Congress on the results of its "review."[52]

Disregarding that plain language, MVPD commenters persist in inaccurately describing STELAR's carefully limited instruction as a congressional directive "to commence a robust and searching rulemaking to review its totality of the circumstances test."[53] For support, MVPDs latch

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[51] *See, e.g.*, Cablevision Comments at 6 (referring to the "mandate in STELAR to revisit the good faith requirements for retransmission consent"); AT&T Comments at 29 (suggesting that STELAR "directed the Commission to undertake this *rulemaking*") (emphasis added); Mediacom Comments at 19 (asserting that "the Commission has the opportunity and the obligation not just to review it[s] rules, but to update them").

[52] *See* Affiliates Associations Comments at 2; Media General Comments at 2, 3-5. As Media General points out, where Congress does intend for the Commission to take particular affirmative action beyond a "review" of its rules, it makes that intent clear in the statute. *Id*. at 5-6 (citing Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996); Consolidated Appropriations Act 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Sections 202(c) and 202(h) of the 1996 Act) (mandating that the Commission "shall review its [media ownership] rules," "shall determine whether any of such rules are necessary in the public interest as the result of competition," and "shall repeal or modify any regulation it determines to be no longer in the public interest").

[53] *See, e.g.*, ACA Comments at 3, 85; ATVA Comments at 52-53; Cablevision Comments at 2; Mediacom Comments at 6, 19; Comments of Charter Communications, Inc. (Dec. 1, 2015) ("Charter Comments") at 2, 4.

onto language in a single Senate report suggesting that the Commission should take a "robust" look at negotiating practices and even address the "substantive terms" of retrans agreements.[54] That report, as The Walt Disney Company points out, accompanied an earlier version of the bill and, in any event, focused predominantly on procedural considerations related to retrans negotiations, not substantive terms negotiated between parties at arm's length.[55] In any event, an isolated statement in a Senate Report (particularly one accompanying an unenacted version of the final law) cannot override the unambiguous and narrow statutory command: "[N]o amount of unenacted legislative history can override the plain language of statutes that have endured the rigors of bicameralism and presentment."[56]

The Commission, itself, observed, at the outset of the good faith regulatory regime, that "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity."[57] STELAR's limited directive to "review" the "totality of the circumstances" test is demonstrably not a directive to the Commission to "insert itself" into the substance of privately-negotiated retransmission consent agreements—and it most certainly does not endow the Commission with authority to require broadcast stations, directly or indirectly,

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[54] *See* ACA Comments at 5; ATVA Comments at 37; Cablevision Comments at 2, 11; AT&T Comments at 29; TWC Comments at 3; Mediacom Comments at 6; Comments of Cox Enterprises, Inc. (Dec. 1, 2015) ("Cox Comments") at 8 & n.14; USTA Comments at 2, 7; ITTA Comments at 1-2 (all citing Report from the Senate Committee on Commerce, Science, and Transportation accompanying S. 2799, 113th Cong., S. REP. NO. 113-322, at 13 (2014)).

[55] *See* Walt Disney Comments at 10 & n.23.

[56] *Iliev v. Holder*, 613 F.3d 1019, 1024 (10th Cir. 2010).

[57] *Good Faith Order*, 15 FCC Rcd at 5454, ¶ 23.

to forego their retransmission consent rights or to grant carriage on terms dictated by the Commission or self-interested MVPDs.

Nor can the Commission find authority outside STELAR for the far-reaching changes to the good faith rules that the *Notice* proposes. The Communications Act, which emphatically and categorically prohibits retransmission of a local broadcast station's signal without its consent, provides none. MVPD commenters, nevertheless, ask the Commission not only to make sweeping and unwarranted revisions to the totality of the circumstances test, but to go well beyond that: to identify a broad assortment of negotiating practices and proposals—by broadcasters alone, of course—as *per se* evidence of bad faith[58] and to impose drastic "remedies" for perceived failures to negotiate in good faith.[59] Commission action on the sweeping changes the *Notice* proposes and MVPDs endorse would exceed both the limited oversight role the Communications Act envisions and the limited direction contained in STELAR.

Even if Congress *had* directed the Commission to revise, update, or improve upon its existing good faith rules if its "review" of the totality of the circumstances test led it to conclude that such a course was necessary—which it plainly did not—the record in this proceeding makes

[58] *See, e.g.*, ACA Comments at 14 (proposing seven additional *per se* violations of the good faith negotiating requirement); ATVA Comments at 42-51 (proposing seven additional *per se* violations of the good faith rules); CenturyLink Comments at 1, 3-5 (proposing four additional negotiating behaviors amounting to bad faith *per se*); Cablevision Comments at 3 (proposing two additional practices as *per se* violations of the duty to negotiate in good faith); AT&T Comments at 1-2, 11-26 (proposing six additional practices as *per se* violations); TWC Comments at 9-22 (proposing roughly a dozen additional practices as *per se* violations); ITTA Comments at 7-13 (proposing several practices as *per se* violations and endorsing ATVA's proposals); NTCA Comments at 10-11 (endorsing ATVA's proposals).

[59] *See, e.g.*, Mediacom Comments at 22-24; TWC Comments at 27.

clear that no such sweeping reform is, in fact, called for.[60] The "totality of the circumstances" test is not "vague and overly permissive"[61] but helpfully flexible, adaptable, and sensitive to the unique facts of a particular retransmission consent negotiation, just as Congress and the Commission intended it to be when the good faith negotiation requirement was implemented more than 15 years ago. The Commission should not undermine the utility of that fact-dependent test by adopting the "reforms" proposed in the *Notice*, which are overwhelmingly one-sided, imposing limitations and obligations on broadcasters only, to the decided regulatory advantage of MVPDs. In particular, the Commission should emphatically *reject* MVPD calls to expand the list of "*per se*" bad faith negotiating behaviors, in keeping with the Commission's longstanding refusal to proscribe particular conduct unless the conduct clearly evidences bad faith "in all possible instances."[62]

MVPD commenters appear to have lost sight of the very predicate for the good faith negotiation rules: to bring broadcast stations and MVPDs to the bargaining table in a sincere attempt—that is, in "an atmosphere of honesty, purpose and clarity of process"[63]—to conclude a mutually acceptable agreement for retransmission of the station's signal to the MVPD's subscribers. From the very outset, Congress and the Commission have made plain that it is not

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[60] MVPDs' own arguments underscore that Congress itself will act to regulate the *substance* of retrans negotiating behaviors when it believes such regulation is appropriate. *See, e.g.*, AT&T Comments at 27 (noting that Congress "strengthened the Commission's recent prohibition against joint negotiation" in STELAR).

[61] ACA Comments at 10.

[62] *Good Faith Order*, 15 FCC Rcd at 5457, ¶ 31.

[63] *Good Faith Order*, 15 FCC Rcd at 5455, ¶ 24.

the Commission's role "to dictate the outcome of . . . marketplace negotiations."[64] And since the inception of the good faith rules, MVPDs and broadcasters have been successfully negotiating retransmission consent without a heavy regulatory hand steering the substantive negotiations toward particular results. Nothing in STELAR, the *Notice*, or the self-serving comments of MVPDs suggests that the Commission should reconsider that approach.[65]

IV. The Substantive Terms of Retransmission Consent Agreements Must Be Determined by Arm's-Length Negotiation, Not Commission Decree

The Affiliates Associations' opening comments explained in detail why Commission oversight of the substantive minutiae of privately-negotiated retransmission consent agreements—including even core economic terms—is not only improper under Section 325 and contrary to the Commission's own longstanding reluctance to interfere but also unmanageable as a practical matter and unwarranted on the merits. Commission micromanagement of the substance of retransmission consent agreements would lead to regulatory (and marketplace) paralysis, as the Commission, obviously, is not equipped or staffed to micromanage the thousands of retransmission consent negotiations that take place each year. The Commission should maintain its longstanding and well-founded refusal to inject itself into the particulars of the multitude of

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[64] S. REP. NO. 102-92, 102nd Cong., 1st Sess., at 35-36 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169.

[65] The Affiliates Associations observed the slippery slope the Commission will confront if it attempts to expand the "totality of the circumstances" test to "dictate the outcome" of market negotiations, and the unwarranted expansion of its limited regulatory authority that change would reflect. *See* Affiliates Associations Comments at 30-31. Merely "claiming it constitutes 'bad faith' not to comply with the Commission's preferred substantive rule" would "literally leave the Commission in a position of limitless power to regulate anything and everything using the pretext of the good faith rubric." Fox Comments at 16.

retransmission consent agreements negotiated between local stations and pay TV providers—Congress would not stand for or fund it.[66] The fact that the parties negotiate aggressively within the framework of a congressionally-mandated *process* that requires openness and honesty at the bargaining table does not call for government regulation of the *substance* of those negotiations—particularly not for the singular purpose of reducing the price MVPDs pay for broadcast programming.

It is not necessary to repeat here the detailed arguments contained in comments filed by various broadcasters against Commission adoption of each of the regulatory proposals listed in the *Notice*. It is sufficient to note that MVPDs' endorsement of the multiple "reforms" proposed in the *Notice* are, quite plainly, pleas for the Commission to dictate a wealth of retransmission consent terms and conditions in their favor—from the minutiae of tier placement and the timing of opening proposals to the very essence of determining retransmission consent *rates*. As just a few examples illustrate, those transparently self-serving arguments should be rejected.

A. A Regulatory Prohibition on Expiration of Retransmission Consent Agreements on the Eve of "Marquee Events" Would Be Impossible to Administer

Multiple MVPD commenters urge the Commission to prohibit all contract expiration dates in proximity to a "marquee" sports or entertainment event,[67] but their comments only underscore

[66] *See Good Faith Order*, 15 FCC Rcd at 5448, ¶ 6 (discerning congressional intent that the Commission refrain from undertaking "detailed substantive oversight" of retransmission consent negotiations).

[67] *See, e.g.*, CenturyLink Comments at 6-7; AT&T Comments at 18-19; ACA Comments at 58-60; ATVA Comments at 27-28.

both the impossibility and the unfairness of such a rule.[68] As one example, AT&T purports to illustrate the need for such a rule by pointing to the retransmission consent negotiation between its new subsidiary, DIRECTV, and Media General, in which "DIRECTV faced a potential blackout for 88 local stations during the middle of the NFL season, the MLB playoffs, and a new season of prime-time network shows."[69] To begin with, the negotiation AT&T references was not a dispute, and Media General stations were never removed from DIRECTV's systems. And more to the point, the "NFL season" is roughly five months long (early September through early February), the MLB playoffs last for nearly a month in the fall, and prime-time network shows debut, air, and conclude throughout the calendar year.

MVPDs' proposed rule would make it a *per se* violation of the good faith negotiation requirement for a broadcast station to "[w]ithhold retransmission consent during the airing of, during the one-week run up prior to, or for one day after a Top-Rated Marquee Event"[70]—essentially carving out multiple, lengthy windows during which broadcast stations would effectively be prohibited from terminating or withdrawing retransmission consent, contrary to the plain intent of Section 325. That proposed rule is riddled with flaws. *First*, it would be nearly impossible for broadcasters and MVPDs to know with certainty three years in advance, when new

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[68] *See, e.g.*, Media General Comments at 11; Affiliates Association Comments at 32-35; NAB Comments at 47-48; Gray Comments at 7-8 (all addressing the impossibility of crafting and enforcing a "marquee event" timing rule).

[69] AT&T Comments at 18. *See also, e.g.*, ATVA Comments at 27 (listing "the Super Bowl, the NFL Playoffs, the World Series, the Academy Awards, the Olympics, College Bowls, and other key content" as among so-called "marquee events").

[70] AT&T Comments at 19; ACA Comments at 59. MVPDs would define a "Top Rated Marquee Event" as a program "for which the most recent telecast of that event or comparable programming received a nationwide Live + Same Day U.S. Rating of 7.00 or greater on the Persons 2 + demographic by Nielsen . . . ."—with "comparable programming" being determined by the Commission. AT&T Comments at 19; ACA Comments at 59.

agreements are being negotiated, the dates of all so-called "marquee events." *Second*, if "marquee event" windows are calculated as broadly as MVPDs propose, what days would be left? And *third*, if only a limited number of permissible days remained on which agreements could terminate, MVPDs would be sure to complain that all agreements terminate at the same time. In short, MVPD endorsements of a "marquee event timing" rule would require convoluted calculations of the relevant "windows," effectively leaving broadcasters with no choice but to (involuntarily) grant extensions of an expiring retransmission consent agreement upon an MVPD's demand—flatly contrary to Section 325.

No MVPD commenter offered a cogent, let alone persuasive, reason why MVPDs should be entitled to the benefit of reselling a local station's signal when they have failed to reach an agreement with the station as to the terms and conditions of the resell agreement. Section 325 flatly prohibits retransmission of a station's signal without its consent, and nothing in STELAR alters that prohibition or empowers the Commission to allow MVPDs to retransmit and resell a broadcast station's signal absent consent of the station. Here, as elsewhere, the Commission should allow market forces to dictate the timing (as well as other substantive terms) of expiration and renewal of retransmission consent agreements, mindful that broadcasters too have every incentive to ensure that their "marquee programming"—and the advertisements it contains—reaches as many viewers as possible.

B. The Commission Should Not Compel Broadcast Stations to Make Their Content Available Online

MVPD arguments for a *per se* prohibition on "online blocking" complain that broadcasters "indiscriminately" block access by an MVPD's Internet subscribers, whether or not the subscribers receive the MVPD's video service.[71] Those arguments assume, without support, that (1) it would be possible—which it would not be—for a broadcaster to identify, know, and limit Internet access to the station's content only by those Internet subscribers who also subscribe to the MVPD's video service, and (2) a broadcaster is obligated to make its content available over the Internet to all persons other than those particular subscribers to the video service provided by the MVPD with whom the broadcaster is engaged in a retrans dispute.[72] Both presumptions are unfounded.

To begin with, the good faith negotiation requirement applies to the distribution of broadcast content *by MVPDs*—not to online distribution. The *Notice* cites no source of Commission authority to regulate online provision of video programming. Moreover, the Copyright Act confers on broadcasters the *exclusive* right to decide upon and control the distribution of their content.[73] It is beyond debate that the Commission's regulatory authority does not trump copyright law. MVPDs' generalized arguments about consumer interest in access to

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[71] *See, e.g.*, ACA Comments at 48-58; CenturyLink Comments at 3; AT&T Comments at 12-13; TWC Comments at 23-24; Cox Comments at 8-9; Mediacom Comments at 27-28; ATVA Comments at 23; USTA Comments at 7-9; Comments of National Cable & Telecommunications Association (Dec. 1, 2015) ("NCTA Comments") at 3-5.

[72] *See, e.g.*, AT&T Comments at 14 (declaring, without citation, that "when broadcasters make their content available over the air for free, they have no right to prevent someone from receiving that signal within their broadcast area"); TWC Comments at 23-24.

[73] *See* Fox Comments at 14; Hearst Comments at 11; Comments of News-Press & Gazette Company (Dec. 1, 2015) ("NPG Comments") at 20-21; Nexstar Comments at 19 (arguing that "the Commission must not take any action that would cause a broadcaster to violate the copyright rights of any content owner"); Affiliates Associations Comments at 54-58 (citing, *inter alia*, 17 U.S.C. § 106(4) and *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) (declaring that "a copyright owner has the capacity arbitrarily to refuse to license to one who seeks to exploit the work")).

programming and broadcasters' public interest obligations[74] cannot override broadcasters' indisputable rights under federal copyright law.[75]

C. Contractual Restrictions on Importation of Duplicating Out-of-Market Programming Must Be Respected

Unsurprisingly, MVPD commenters give short shrift to legitimate contractual and copyright law constraints on network affiliates' freedom to grant retransmission consent outside the station's DMA, urging the Commission to "adopt[] a new *per se* violation" of the good faith duty for networks to interfere with out-of-market stations' willingness to grant retrans consent[76] and to prohibit broadcasters from invoking the Commission's syndicated exclusivity and network non-duplication rules during a retransmission consent impasse.[77] Setting aside the obvious points

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[74] *See, e.g.*, Mediacom Comments at 8-13; ACA Comments at 52; ATVA Comments at 23.

[75] MVPDs likewise either downplay or fail altogether to acknowledge the First Amendment issues that would be implicated by any Commission rule effectively *forcing* broadcasters to speak by distributing their programming online. *See, e.g.*, Affiliates Associations Comments at 54 n.126; Media General Comments at 8. Attempts to analogize to the Open Internet rules (*see, e.g.*, ACA Comments at 52-53; TWC Comments at 24 (arguing that "blocking" by broadcast networks "directly implicates the online blocking concerns that the Commission has consistently articulated in the net neutrality context"); NCTA Comments at 4) fall short. "Blocking" by broadband Internet access service providers effectively forecloses *all* Internet access to content that a rights-holder has already chosen to make available. In all events, as Fox notes, the Commission's Open Internet rules emphatically disclaim any intent to "regulat[e] the Internet, *per se*, or any Internet applications or content." *See* Fox Comments at 15 (quoting *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5622, 5775 (2015)).

[76] *See* ACA Comments at 65-70; AT&T Comments at 20-21.

[77] *See* CenturyLink Comments at 4-5; Mediacom Comments at 23-26 (proposing that it should be "a presumptive violation of the good faith negotiation requirement" for a local broadcast station that declares a negotiating impasse to invoke the network non-duplication and syndicated exclusivity rules against an MVPD's carriage of a substitute station").

that (1) a broadcast station's signal is never "blacked out" during a negotiating impasse, so no importation of duplicating programming is necessary, and (2) MVPDs' proposed rule plainly would regulate the substance of network affiliation (or syndication) agreements rather than the good faith negotiation *process*, such a rule would be deeply problematic.[78]

Broadcast networks and their affiliates should jointly be free to determine the market-based terms and conditions on which affiliated stations are authorized to broadcast network programming. If a network affiliation (or syndication) agreement prohibits an affiliate station from granting retransmission consent outside its market, the Commission must continue to respect those bargained-for provisions, as must MVPDs. Indeed, as one commenter explained, "[c]ompliance with existing statutes and Commission rules"—including the program exclusivity rules—"is the definition of good faith bargaining."[79] Commission negation of those bargained-for geographic exclusivity protections and the efficient enforcement mechanism provided by the existing exclusivity rules in the guise of good faith rulemaking would have disastrous consequences for broadcast localism.[80]

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[78] In fact, one MVPD unapologetically urges the Commission to dictate the terms of network affiliation agreements. *See* TWC Comments at 17 (arguing that "the Commission should make clear that *stations' network affiliation agreements must not prohibit* temporary importation in the event of a blackout") (emphasis added).

[79] Media General Comments at 12.

[80] *See generally, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 10-71 (June 26, 2014); Comments of the ABC Television Affiliates Association, MB Docket No. 10-71 (June 26, 2014); Affiliates Associations Comments at 26 n.68.

D. The Commission Must Not Dictate Core Economic Terms of Retransmission Consent Agreements in the Guise of Measuring Good Faith Negotiating Behavior

Unsurprisingly, MVPDs endorse several proposals in the *Notice* that would effectively have the Commission dictate retransmission consent agreement terms that govern the rate, computation, timing, and other key elements of the compensation provided to broadcasters in exchange for the right to resell their signals—in other words, the very economic core of the parties' bargain.

For the reasons explained in the Affiliates Associations' opening comments, the Commission cannot and must not micromanage negotiated retransmission consent resell rates on the pretense of preventing "price discrimination," particularly when the Communications Act expressly contemplates variation in pricing terms based on "competitive marketplace considerations."[81] MVPDs' calls for a Commission prohibition on, or at least careful oversight of, "discrimination in price" among MVPDs in a single market[82] make little more than a passing nod to that express statutory approval of price differentials. And the rule MVPDs propose would be wholly unworkable in practice and legally unfounded, as it would place the Commission in the

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[81] 47 U.S.C. § 325(b)(3)(C)(ii) (("it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations"). *See* Affiliates Associations Comments at 21-25.

[82] *See, e.g.*, CenturyLink Comments at 4 (proposing that "[a] broadcaster's discrimination in price among MVPDs in a market absent a showing of direct and legitimate economic benefits associated with such price differences should also be per se evidence of bad faith negotiation" and suggesting that price differentials premised on "scale" is "not well founded" because "the cost to broadcast and value of the broadcast content is not variable based on the size or number of distributors"); Charter Comments at 6-7; ITTA Comments at 9-10.

role of rate regulator, evaluating and passing judgment on the merits of broadcasters' (unspecified) submissions in justification of price differentials. Most importantly, if the Commission is concerned about consumer welfare generally and the prices consumers pay for subscription television in particular, it should address those issues by regulating *retail* pay TV prices, not by regulating one (small) input into wholesale prices.[83]

Similarly, in connection with their arguments for a prohibition on "bundling" (further discussed in Section IV.E, below), MVPDs ask the Commission to determine whether a broadcaster's standalone offer for retransmission of its primary signal is a "*real economic alternative* to a bundle of broadcast and non-broadcast or multicast programming."[84] That proposal, too, would inject the Commission into pure regulation of retransmission consent rates, because MVPDs would have the Commission consider

> a comparison of the proposed rates for standalone carriage to: (1) the past retransmission fees that the MVPD has paid for the primary signal; (2) the current retransmission fees charged to other MVPDs for the primary signal; and (3) the current retransmission fees charged for comparable channels.[85]

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[83] *See* Hearst Comments at 3-4 ("In the absence of the Commission's ability and willingness to regulate MVPD rates—which runs counter to the Commission's ongoing regulatory initiatives—any action in this docket will almost certainly harm broadcasters without any commensurate positive impact on MVPD subscribers.").

[84] *See, e.g.*, AT&T Comments at 15 (emphasis added) (proposing that the Commission treat as a *per se* violation of the good faith negotiation requirement a broadcaster's refusal "to make a standalone offer for the MVPD's carriage of the television broadcast station that is a real economic alternative to a bundle of broadcast and non-broadcast or multicast programming (for example, justified by actual prices for other similar broadcast channels in the same market)"); TWC Comments at 22 (arguing that any Commission "prohibition on forced bundling . . . must ensure that the broadcaster's standalone offer is not simply an attempt to coerce the MVPD into accepting the larger unwanted bundle").

[85] AT&T Comments at 17.

The flaws in the proposal are obvious and insurmountable: The Commission simply is in no position—and lacks the authority—to make determinations about the "economic alternatives" considered, rejected, and negotiated between hundreds of stations and hundreds of MVPDs in hundreds of different markets across the country.

Equally problematic, MVPDs would preclude broadcasters from seeking or even *proposing* a method for calculating retrans fees that would count all of the MVPD's subscribers, whether or not they receive the MVPD's pay TV service.[86] This "rule" too has nothing to do with whether a broadcaster has come to the negotiating table in good faith to discuss the terms and conditions of a retrans agreement. MVPDs do not need a government prohibition on such proposals in order to achieve a level playing field at the negotiating table when they remain entirely free to respond to broadcaster proposals for calculation of retrans fees with counter-proposals of their own.

In each instance, MVPDs' entreaty is indisputably a request for the Commission to inject itself into the substance—in fact, the very heart—of retransmission consent/signal resell agreements in MVPDs' favor by dictating the methods by which retrans/resell fees are calculated and even the prices that broadcasters will be paid. Stripped of their consumer-protection rhetoric, these proposals are yet another variation, and perhaps the most blatant, of MVPDs' calls for regulatory intervention to reduce their costs and enhance their profits.

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[86] *See, e.g.*, CenturyLink Comments at 4; AT&T Comments at 25-26; TWC Comments at 14-15; ATVA Comments at 32-33; USTA Comments at 19.

E. The Commission Should Not Depart from Its Longstanding Position That Proposals for Bundling of Broadcast Signals with Other Programming Are Consistent with Good Faith Negotiation

As multiple commenters noted, "[n]on-cash, in-kind consideration"—including discounted pricing for a "bundle" of programing services—has been a consistent and essential feature of retransmission consent arrangements" since the outset of the retransmission consent regime.[87] The Commission has long recognized that those arrangements are not inherently anticompetitive; in fact, discounted pricing for "bundles" of programming services can incentivize and enable the creation of new and innovative content, to the ultimate benefit of consumers.[88]

MVPDs' opening comments nevertheless urge Commission regulation of the longstanding practice of bundling broadcast signals with other channels of programming, complaining that bundling raises retransmission consent (and, consequently, consumer) costs, compels MVPDs to devote space on the most popular programing tiers to content that consumers have not demanded, make service disruptions more likely, and thwart the ability of non-affiliated program networks to obtain carriage.[89] Those arguments ignore the weight of comments establishing that bundling

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[87] Univision Comments at 9.

[88] *See Good Faith Order*, 15 FCC Rcd 5445, 5469, ¶ 56 (describing "[p]roposals for carriage conditioned on carriage of any other programming" as presumptively "consistent with competitive marketplace considerations and the good faith negotiation requirement"); Media General Comments at 9 ("It is common for Media General to offer options to MVPDs to carry one or more multicast networks at different price points, a pro-competitive practice that cuts down on transactions costs for MVPDs"). Even MVPDs recognize the benefits of bundling, although they endorse it only at the *retail* level. *See, e.g.*, USTA Comments at 11-12 ("While MVPDs bundle programming to offer consumers more choice and often reduce costs, this form of forced bundling by broadcasters is simply an abuse of the retransmission consent rule . . . .").

[89] *See, e.g.*, Cablevision Comments at 5-6; ACA Comments at 15-33; ATVA Comments at 24-27; CenturyLink Comments at 6 (claiming, without support, that bundling leaves MVPDs with

actually *benefits* consumers by enabling the creation and dissemination of new, innovative, and diverse content as well as the body of Commission orders that have, from the outset of the good faith regime, described broadcasters' requests for "bundling" as proper and even pro-consumer.[90]

MVPDs would have the Commission prohibit a broadcaster from even offering or proposing to bundle channels—a dramatic departure from the Commission's rules and a significant and unwarranted intrusion into the substance (rather than the *process*) of retrans negotiations. The bundling of channels, just like the other substantive terms of retransmission consent agreements, should be resolved at the negotiating table. Broadcasters should remain free to propose a bundled deal, and MVPDs remain equally free to respond with a counter-proposal, to negotiate for retrans of each signal separately, or to flatly reject a broadcast station's proposal to bundle channels—and they do.[91] By the same token, broadcasters are in no position to "force" an unwilling MVPD

"no real choice as to whether to carry the bundled channels"); AT&T Comments at 15-16 (claiming that "where broadcasters that have a monopoly on access to certain desirable content exercise market power to require MVPDs to take unwanted programming, their practices go beyond ordinary competitive market practices"); TWC Comments at 18 (alleging that "networks increasingly are tying the sale of their local affiliates' retransmission consent rights with other programming"); *id*. at 22 ("the Big Four networks enjoy significant bargaining advantages over their increasingly fragmented MVPD counterparts," so that bundling proposals "*do* result from the exercise of market power") (emphasis in original). TWC's comments notably are directed to *network* practices, not to the supposed "market power" of local broadcast stations to insist on "tying."

[90] *See, e.g.*, Univision Comments at 10; Fox Comments at 11-12; NPG Comments at 19-20 ("If anything, consumers benefit from bundling, as they are frequently exposed to programming on multicast channels that they might not otherwise receive."); Media General Comments at 8 (noting that "[m]any Media General stations utilize their spectrum to carry free, OTA multicast networks," which "contain additional, valuable programming," including "24/7 weather coverage").

[91] *See, e.g.*, Morgan Murphy Comments at 4 (noting that "MVPDs often refuse to carry these [multicast channels] and provide no specific information to . . . Morgan Murphy to support this refusal").

(particularly large providers with significant negotiating leverage like AT&T/DIRECTV or DISH) to accept a bundle of programming by making a "take it or leave it" offer. Broadcasters have strong incentives to reach agreement with MVPDs for the carriage of their signals, lest they lose access to the substantial number of pay TV customers—and with them, the retransmission consent and advertising revenues they bring. Contrary to MVPD commenters' implications, broadcasters simply do not hold all the cards.

If a broadcaster's "bundling" proposal is, in fact, suggestive of a predatory attempt to restrain trade, the antitrust laws exist to protect MVPDs against harm, as multiple commenters have noted. Apart from those situations, however, broadcast stations and MVPDs should be free to propose, reject, and negotiate to reach agreement for the right to retransmit a stand-alone signal or a bundle of the station's programming services—precisely as a healthy marketplace operates.[92]

F. Although Not an Element of Good Faith Negotiation, the Commission Should Not Allow Networks to Commandeer Affiliates' Retransmission Consent Rights

As explained in the Affiliates Associations' opening comments, network appropriation of affiliate stations' retransmission consent negotiation rights is not an issue that bears on the "good faith negotiation" questions raised by the *Notice*.[93] Nevertheless, the Affiliates Associations reiterate that networks are prohibited from commandeering, either directly or indirectly, the ability of affiliate stations under Section 325 of the Communications Act to negotiate the terms and conditions on which a station's signal will be retransmitted. An attempt by a broadcast network

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[92] *See* Univision Comments at 11 ("Indeed, that some MVPDs opt to purchase Univision's full suite of services while others do not is proof of an efficient and competitive market.").

[93] *See* Affiliates Associations Comments at 44-47.

to appropriate the statutory *right* and *responsibility* of an affiliate to negotiate the terms and conditions on which the affiliate's signal can be retransmitted raises fundamental questions of network overreach—and would violate core policies underlying the Commission's longstanding network affiliate rules.[94]

V. MVPD Proposals for Remedies or Sanctions Against Broadcasters Cannot Be Reconciled with the Unambiguous Language of the Communications Act

MVPD commenters propose a number of unacceptably severe "remedies" or "sanctions" for violations of the good faith negotiation rules. One commenter, for example, urges the Commission to "add teeth to its enforcement of the good faith rules" by "providing that if a broadcaster violates the good faith rules, it gives up its retransmission consent rights and defaults to must-carry for a specified period."[95]

The Commission has never been given—and has, until now, never purported to assert—authority to directly or indirectly require broadcast stations to forego their retransmission consent rights or to grant carriage on terms dictated by the Commission or MVPDs. That indisputable fact dispenses with MVPD proposals for "remedies" or "sanctions" for supposed broadcaster bad faith negotiation in the form of withdrawing a broadcaster's retrans rights, compelling arbitration, or mandating interim carriage.[96] Congress has endowed broadcasters with the unqualified statutory

[94] *See* 47 C.F.R. § 73.658(d), (e) (restricting networks from interfering with the program decisions of an affiliate and from "optioning" an affiliate's broadcast time).

[95] TWC Comments at 27.

[96] *See, e.g.*, Mediacom Comments at 22-24 (proposing that it should be "evidence of bad faith for a negotiating party to refuse to agree to an extension of an expiring agreement in the absence of a legitimate reason, apart from bullying the other side, for causing disruption to consumers" and that, if negotiations reach an impasse, the existing agreement "would be allowed

right to elect must-carry or retransmission consent: "No cable system or other [MVPD] shall retransmit the signal of the broadcasting station, or any part thereof, except . . . with the *express authority* of the originating station . . . ."[97] Congress has never suggested—and did not suggest in STELAR—that the Commission is free to withdraw that right from a particular broadcast station in order to force a retransmission consent agreement into place, to "punish" a local station, or otherwise.

VI. Conclusion

For the foregoing reasons as well as those explained in their opening comments, the Affiliates Associations respectfully urge the Commission to make no change to its "totality of the circumstances" test for determining whether broadcasters and MVPDs have satisfied their obligation to negotiate retransmission consent in good faith.

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to expire, but only after a 60-day 'cooling off' period"); *id*. at 40-41; Verizon Comments at 5 (urging the adoption of a "standstill requirement that maintains the *status quo* and allows continued carriage of a broadcast station signal as long as the parties are engaged in good-faith negotiations for renewal of a retransmission consent agreement"). MVPD proposals for other "remedies" for supposed violations of the good faith rules, such as non-binding mediation (*see, e.g.*, Mediacom Comments at 22-26, 39-41; Cox Comments at 2-7) or "[m]andatory final-offer arbitration" (Public Knowledge Comments at 17-21) should likewise be rejected, as they will do nothing but add cost and complexity to retransmission consent negotiations—but cannot and will guarantee that the parties reach agreement. And the Commission has made clear that it "does not have the authority to require the parties to submit to binding arbitration" in any event. *Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35, 45, ¶ 25 (2007).

[97] 47 U.S.C. § 325(b)(1) (emphasis added).

Respectfully submitted,

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